IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH RAYMOND BESWICK, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 00-1304

MEMORANDUM

Giles, C.J. March 1, 2001

I. INTRODUCTION

Ralph Raymond Beswick, Jr. and Rose Wiegand, Co-Administrators of the Estate of Ralph Richard Beswick, Sr., have brought a federal constitutional tort action pursuant to 42 U.S.C. § 1983, against the City of Philadelphia ("City") and its former 911 dispatcher, Julie Rodriguez, and, asserting pendent jurisdiction, have brought a state law negligence action against Julie Rodriguez, and Father and Son Transport Leasing Inc., d/b/a CareStat Ambulance and Invalid Coach Transportation, Inc., a private ambulance service, its owners and two of its employees, Slawomir Cieloszcyk, Gregory Sverdlev, Ruslan Ilehuk, Ivan Tkach, together with Star Technical Institute, Inc., a paramedic training school, and a John/Jane Doe of Star Technical Institute, Inc.

These claims all arise from the death of Ralph Richard Beswick, Sr. on February 11, 2000. A federal claim had been asserted against Bucks County, but that was dismissed by

agreement of the parties.

No state law negligence, or respondeat superior, claim has been asserted against the City.

Now before this court is the City's Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons that follow, that motion is granted, in part, and denied, in part.

II. FACTUAL BACKGROUND

Consistent with the review standards applicable to a motion to dismiss, the alleged facts, taken from the Complaint and viewed in the light most favorable to plaintiffs, follow.

A. The 911 Call

In January 1996, the City hired Julie Rodriguez as a "911" call taker and dispatcher. (Compl. ¶ 26.) Ms. Rodriguez came to be suspended six times by the City, and, in December 1997, she was rated as "unsatisfactory" by her supervisor. (Compl. ¶¶ 28-29.) There is no allegation, however, that she had been suspended for any misconduct of the type that could be claimed to have been life threatening to members of the public.

On February 11, 2000, Ralph Richard Beswick, Sr. collapsed unconscious, but breathing, on the kitchen floor of his home in the Kensington section of Philadelphia. He lived there with Rose Wiegand, Mr. Beswick's common law wife of 27 years. (Compl. ¶¶

94-95; Pl. Resp. to Mot. to Dismiss, Exh. B.) At approximately 7:53 p.m., Mrs. Wiegand dialed 911. (Compl. ¶¶ 94-95.) This call was received by Ms. Rodriguez. Mrs. Wiegand told Ms. Rodriguez that Mr. Beswick needed urgent assistance and requested an ambulance. (Compl. ¶¶ 96-97.) Ms. Rodriguez responded, "Okay. Alright, so we'll have somebody on the way okay." (Pl. Resp. to Mot. to Dismiss, Exh. B.) It is alleged that Ms. Rodriguez then chose to violate an established regulation that requires 911 operators to refer all emergency medical calls to the Fire Department, which then dispatches Fire Rescue Units appropriately equipped and staffed to respond to such emergencies. (Compl. ¶ 54.) She called the private ambulance company with which she worked in her off-duty hours, as dispatcher, rather than entering the details of the call into the City's Fire Department emergency response system. (Compl. ¶ 56.)

It is alleged that on and before February 11, 2000, Ms. Rodriguez and an unknown number of other 911 dispatchers were similarly permitted to violate the established Fire Department regulation which directed dispatchers to refer all medical emergency calls to the Fire Department. It is alleged that, although she knew she was violating the regulation, she was emboldened to do so because of a custom and practice of the City's policymaker personnel to condone, through deliberate indifference, 911 operators referring emergency assistance calls

to private ambulance services. (Compl. ¶ 121H.)

On the night in question, immediately after speaking with Mrs. Wiegand, Ms. Rodriguez by telephone spoke to Slawomir Cieloszcyk, the owner and dispatcher of CareStat Ambulance, Inc., a private ambulance service located in Langhorne, Bucks County. Although Ms. Rodriguez's motive in violating the Fire Department regulations is not specifically alleged, it is sufficiently alleged that she acted intentionally, and not because of mistake, and for personal benefit of some kind, as opposed to carrying out her duties as a 911 dispatcher. (Compl. ¶¶ 37, 47, 48, 50, 52.)

After advising Mr. Cieloszcyk that Mr. Beswick was age 65 and unconscious, Ms. Rodriguez asked how soon could CareStat get to the Beswick home. Mr. Cieloszcyk estimated a time of fifteen minutes. He ended the conversation by saying, "We're on the way." (Compl. ¶ 100; Pl. Resp. to Mot. to Dismiss, Exh. B.)

He did not tell Ms. Rodriguez who was being dispatched with the ambulance. Contrary to Pennsylvania's statutory requirements applicable to private ambulances, the assignment was given to employees Ruslan Ilehuk and Ivan Tkach, neither of whom was certified as "Advanced Life Support" ("ALS") or "Basic Life Support" ("BLS") systems personnel, and neither of whom was licensed for Emergency Vehicle Operations ("EVOC"). (Compl. ¶ 100.)

About ten minutes after the first 911 call had been made,

because there was yet no emergency vehicle at the Beswick home, Mrs. Wiegand's sister called 911 again, at 8:02 p.m., to ask whether rescue services had already been dispatched to Mr. Beswick's address. This call was also received and handled by Ms. Rodriguez. Despite this second urgent call, Ms. Rodriguez still did not enter the call into the City's emergency dispatch system. She relied upon a belief that CareStat was on the way to the Beswick home as Mr. Cieloszcyk had promised.

Two minutes later, at 8:04 p.m., Mrs. Wiegand placed a third call to 911. The call reached a different dispatcher, Jose Zayes. Apparently, there was an indication that Mr. Beswick did need, or might need, CPR. Mr. Zayes told Mrs. Wiegand how to administer CPR. (Compl. ¶ 103.) He also responded promptly and appropriately according to the Fire Department regulation. (Compl. ¶ 103.) Through Mr. Zayes' proper actions, a Fire Department paramedic unit was dispatched, and it arrived at Mr. Beswick's home within a few minutes of Zayes' call. (Compl. ¶ 104.) The paramedics provided emergency attention to Mr. Beswick and were able temporarily to restore his pulse. (Compl. ¶ 107.) He was taken to Northeastern Hospital, less than a mile from his home. There, he was pronounced as dead at 9:00 p.m. (Compl. ¶¶ 108-09.)

With knowledge of the third 911 call and Mr. Zayes' actions, Ms. Rodriguez called Mr. Cieloszcyk at CareStat and told him that

a City paramedic unit was responding to the Beswick home, and requested that he hide her involvement in the mishandling of the Mr. Beswick calls. (Compl. ¶ 105.)

The response time delay resulting from Ms. Rodriguez's diversion of the 911 call has been estimated by the City Fire Department to have been at least sixteen (16) minutes and sixteen (16) seconds. (Compl. ¶ 106.) Due to this delay, it is claimed that Mr. Beswick did not receive life-saving medical treatment. (Compl. ¶ 109.)

Approximately ninety minutes after knowingly misdirecting the Beswick 911 calls, Ms. Rodriguez forwarded an unrelated 911 call to Mr. Cieloszcyk's ambulance company. (Compl. ¶ 113.)

B. Alleged Condonation of Illegal Practice by Policymakers

Plaintiffs allege that, upon written request and official approval, the Philadelphia Fire Department allows its employees to engage in outside employment. (Compl. ¶ 121H.) It is claimed that as many as seventy (70) of the City's 267 paramedics and five (5) or six (6) of the City's 46 dispatchers have been granted permission to work part-time for private ambulance companies. (Compl. ¶¶ 33-34.) Private ambulance companies charge patients between $300.00 and $500.00 for transport to hospitals and pay referral fees for the generation of new business. (Compl. ¶ 35.)

Plaintiffs allege that there was a custom or practice by Philadelphia Fire Department call takers, dispatchers, and paramedics of recommending particular private ambulance services to 911 callers in return for referral fees. (Compl. ¶ 37.)

Plaintiffs claim that CareStat employs City Fire Department workers on a "moonlighting" basis, and the City granted Rodriguez permission to "moonlight" for CareStat while she was also in the employ of the City Fire Department. (Compl. ¶¶ 44, 53.)

It is alleged that this misconduct is knowingly tolerated by the City's policymaker personnel, despite the Philadelphia Fire Department regulations that require dispatchers to respond to emergencies by sending only Philadelphia Fire Department rescue crews that are staffed by paramedics who are certified as Advanced Life Support systems ("ALS") personnel, as distinguished from Basic Life Support systems ("BLS") personnel. (Compl. ¶ 54.)

Since the Fire Commissioner is the lowest rung of the policymaker ladder as pled for matters relating to 911 dispatchers' supervision, the complaint must be construed as asserting that the Commissioner, or his authorized designee, knowing of intentional or criminal violations by 911 dispatchers of Fire Department regulations, has knowingly permitted the violations to occur, and to continue, through purposeful lack of supervision and monitoring of dispatchers, or by being

deliberately indifferent to the duty of loyalty that 911 dispatcher employees owed to the City in the performance of their duties.

It is alleged that, Ms. Rodriguez and other 911 call takers and dispatchers have for some time directed calls to private ambulance services, including, but not limited to, CareStat. In violation of established regulations, for at least eight different emergency situations on February 11 and 13, 2000, Ms. Rodriguez directed 911 calls to CareStat that should have been handled by the Philadelphia Fire Department, including the two calls relating to Mr. Beswick. (Compl. ¶¶ 56-57.)

C. The City's Alleged Actionable Relationship with Private Ambulance Companies

The Commonwealth's statutory requirement for ALS units is to have at least two persons on board a private ambulance as follows: either two health professionals; one health professional and one EMT or EMT paramedic; one EMT and one EMT paramedic; or two EMT paramedics. (Compl. ¶ 60; 35 P.S. § 6932(g).) The statutory requirement for BLS units is at least two persons on board a private ambulance, one, an EMT or EMT paramedic or health care professional, and one, an ambulance attendant. (Compl. ¶ 61; 35 P.S. § 6932(e).)

The statute further requires that a private ambulance be inspected "from time to time, as deemed appropriate and

necessary, but not less than once every three years." (Compl. ¶ 62; 35 P.S. § 6932(k).) The statute further requires, inter alia, that a private ambulance be staffed by responsible persons, and be adequately constructed, equipped, maintained and operated safely and efficiently. (Compl. ¶ 63; 35 P.S. § 6932(h).)

The licensing of private ambulance services in the Commonwealth of Pennsylvania is regulated by the Commonwealth's Department of Health which, for administrative reasons, has divided Pennsylvania into 16 regions. The City and County of Philadelphia is a separate region and is designated the Philadelphia EMS Council. Through the Department of Health, the City's Fire Department has been given local control of the licensing, regulation and oversight of all private ambulance services operating within the Philadelphia region. (Compl. ¶¶ 59-60.) Ralph Halper is both a Fire Department Battalion Chief and the Director of the EMS Regional Council for the City. (Compl. ¶ 57.) Through Chief Halper's office, all private ambulance services are licensed for three year terms. (Compl. ¶ 59.) It is alleged that as of February 11, 2000, CareStat was one of more than thirty-five private ambulance services licensed to do business in the City. (Compl. ¶ 54.)

Plaintiffs allege that, in violation of these statutory provisions, the City does nothing on an ongoing basis to ensure that private ambulances are staffed as required. It is claimed

that the inspections that the City does perform of private ambulances are usually undertaken by Michael Tunney at the EMS Regional office. (Compl. ¶ 69.) Plaintiffs do not allege that Mr. Tunney is employed by the City as opposed to the Commonwealth. Because Mr. Tunney does not have sufficient resources, he is capable of inspecting only one ambulance at a time. (Compl. ¶ 70.) It is alleged that Mr. Tunney and the City lack the resources to inspect private ambulances from time to time or to perform spot checks to ensure that EMTs are working for particular companies, or that ambulances contain the requisite equipment. (Compl. ¶¶ 72-73.)

D. Ms. Rodriguez's and other city employees' relationships with private ambulance services

In November or December 1999, Messrs. Ilehuk and Tkach were introduced to Ms. Rodriguez by someone who was an employee and/or agent of Star Technical Institute ("Star"), while the three were enrolled in Star's paramedic training class. (Compl. ¶ 46.) According to plaintiffs, this unidentified person was familiar with the Citywide intermingling of public and private ambulance services, and, believing that CareStat would benefit from having a City 911 dispatcher provide emergency calls to their service, made the introduction so that Ms. Rodriguez might funnel business to CareStat, then a new business, in return for referral fees. (Compl. ¶¶ 47, 49.) Messrs. Ilehuk and Tkach introduced Ms.

Rodriguez to Messrs. Cieloszcyk and Gregory Sverdlev, who offered her employment at CareStat in return for the referral of business from the City's 911 emergency dispatch system.[1] (Compl. ¶ 52.)

III. Discussion

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is appropriate only if, accepting the well-pled allegations of the complaint as true, and drawing all reasonable inferences in the light most favorable to plaintiff, it appears that a plaintiff could prove no set of facts that would entitle it to relief. See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989); Weiner v. Quaker Oats Co., 129 F.3d 310 (3d Cir. 1997). Moreover, the court is "not required to accept allegations that amount to mere legal conclusions or 'bald assertions' without any factual support." Stevens v. O'Brien Environmental Energy, Inc., 1999 U.S. Dist. LEXIS 6660, at *5 (E.D. Pa. 1999) (citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997)).

[1]On October 19, 2000, Ms. Rodriguez pled guilty to twenty (20) criminal charges in the Philadelphia Court of Common Pleas Specifically, Ms. Rodriguez pled guilty to seven counts of unlawful disclosure or use of electronic or oral communications, third-degree felonies; seven counts of obstructing emergency services, third-degree misdemeanors; five counts of recklessly endangering another person, second-degree misdemeanors; and one count of criminal conspiracy, a third-degree felony.

A. 42 U.S.C. § 1983

Section 1983 does not itself create any rights. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985). Rather, Section 1983 provides a remedy for violations of rights created by the Constitution or federal law. See Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). To state a claim, a plaintiff must show that a defendant, acting under color of state law, deprived plaintiff of a right secured by the Constitution or laws of the United States. Daniels v. Williams, 474 U.S. 327 (1986). See also Fagan v. City of Philadelphia, 22 F.3d 1283, 1292 (en banc) (3d Cir. 1994).

Isolated incidents of wrongdoing by non-policymakers are insufficient to establish municipal acquiescence in unconstitutional conduct, so as to support imposition of municipal liability under Section 1983. Cornfield by Lewis v. Consolidated H.S. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993).

Further, a local government may not be held liable for constitutional violations solely on the basis of respondeat superior for the negligent or otherwise improper actions of its employees. Monell v. Department of Social Services of City of New York, 436 U.S. 659 (1978). Consequently, no liability on the part of a municipality can be found merely on the basis of the employment relationship. See Hopp v. City of Pittsburgh, 194

F.3d 434 (3d Cir. 1999) (holding that municipalities cannot be held liable in Section 1983 actions under the doctrine of respondeat superior).

1. Policy or Custom Under Section 1983

"Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)).

"A course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law.'" Andrews, 895 F.2d at 1480 (quoting Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658, 690 (1978)).

Either way, the plaintiff must demonstrate that a policymaker is responsible for the policy or, through acquiescence, for the custom. Andrews, 895 F.2d at 1480. An official with final decisionmaking authority also may delegate his power to a subordinate whose decision, if unconstrained, could then constitute an "official policy." Miles v. City of Philadelphia, 1999 WL 274979 (E.D. Pa. 1999) (citing City of St.

Louis v. Praprotnik, 485 U.S. 112, 126=27 (1988)) (additional citations omitted).

Plaintiffs have alleged four City customs which they contend gave rise to their cause of action for a constitutional tort: (1) knowingly permitting 911 dispatchers to refer medical emergency 911 calls to private ambulance companies, in direct violation of an established Fire Department regulation; (2) knowingly failing to train 911 dispatchers to obey the aforesaid Fire Department regulation; (3) knowingly failing to monitor the activities of dispatchers so as to detect departures from the aforesaid regulation, attempted because of greed, dishonesty, or lack of loyalty to the City; and (4) knowingly permitting the licensing of private ambulance companies and inadequate inspection of their equipment and staffs where it is foreseeable that such companies will engage in fraudulent practices to obtain City licensing and certifications, and that such companies will be called by 911 dispatchers, contrary to law, to respond to medical emergencies.

a. Failure to train or supervise

Where it is alleged that a Section 1983 violation is based upon a failure to train or supervise municipal employees, there must be proof of intentional misconduct by the policymaker or deliberate indifference by the policymaker before municipal liability may attach. There must be pled and proven that there

as an intentional or deliberate abandonment of a known duty. A duty may be established by written rules and regulations or may arise from knowledge of a pattern of employee misbehavior that is likely to cause public harm. Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). Failure to train may amount to deliberate indifference where the need for more or different training is obvious, and inadequacy very likely to result in violation of constitutional rights. Carter, 181 F.3d 357 (citing Canton, 489 U.S. at 389). For example, deliberate indifference may be established where harm occurred on numerous previous occasions, and officials failed to respond appropriately, or where risk of harm was great and obvious. See Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989) (citing Canton, 489 U.S. at 390 n.10).

Concepts of negligence, even gross negligence, cannot be imported into the standards for a constitutional violation.

The third circuit has applied a three-prong test to determine whether a municipality's conduct, through policymakers, rises to the level of deliberate indifference for training. A plaintiffs must plead and demonstrate that: (1) the municipal policymakers knew that employees would confront a particular situation; (2) the situations involve difficult choices or there was a history of employees mishandling of such situations; and

(3) the wrong choice by employees confronting such situations will frequently cause deprivation of constitutional rights. Carter, 181 F.3d at 357 (citing Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992)).

Plaintiffs allege both intentional misconduct by City policymaking personnel and deliberate indifference through lack of training and monitoring of dispatchers. The concept of policymaker intentional misconduct is plain and easily understood, because it is likely to be the same as criminal conduct. Non-criminal official conduct may reach the level of deliberate indifference where the non-policymaking employee could be said to have acted in reliance upon a known official policy or custom, or was permitted to perform without training a function that was obviously dangerous to the public if performed without training.

(1) The City's alleged failure to license and inspect properly private ambulance companies does not meet a proximate cause test

Plaintiffs contend that, by failing to license and inspect properly private ambulance companies, the City "created an atmosphere where private ambulance companies evading any reasonable standard of doing business could flourish." (Pl. Mot. to Dismiss, at 12; Compl. ¶¶ 58-78.) Assuming that this allegation is true, plaintiffs nevertheless fail to state a cause

of action. Even if the private ambulance dispatched by Ms. Rodriguez to the Beswick home on February 11, 2000, was ill-equipped to handle adequately that emergency situation, it never arrived there before the City's paramedics, and CareStat played no role in the administration of aid to Mr. Beswick. Moreover, the Beswicks did not rely upon CareStat. They had no idea that a private ambulance was dispatched. They relied upon the City to send a qualified Fire Department Rescue Unit. As pled, Mr. Beswick's death was caused by the delay of the arrival of a competent City response team, a time delay caused by the misconduct of Ms. Rodriguez. Mr. Beswick's death had nothing to do with the lack of competent care that he would have received if the private ambulance dispatched through Ms. Rodriguez had arrived and had attempted or been unable to give emergency aid.

While plaintiffs' complaint alleges a disturbing state of affairs regarding the City's involvement with the policing of private ambulance companies, it fails to connect those allegations logically and causally to the events that led to Mr. Beswick's death. Therefore, the City's motion to dismiss is granted as to that prong of plaintiffs' claim of municipal liability.

(2) Plaintiffs' allegations of failure to train, monitor, and supervise dispatchers properly amount to no more than a claim of negligence

Plaintiffs allege that, given the "tarnished" history of the City's 911 program, the City's failure to train and supervise adequately and to monitor periodically its 911 dispatchers amounts to deliberate indifference. (Compl. ¶¶ 121E-F.) However, this conclusory assertion does not substitute for plaintiffs' obligation to plead that there existed a pattern of misconduct of the kind engaged in by Ms. Rodriguez that was known to the City's policymakers that, in turn, created a duty upon them to subject 911 dispatchers to special training regarding the directing of emergency medical calls solely to the Fire Department, and not taking bribes (referral fees) and not being disloyal to the City.

There is no allegation that the City's permitting dispatchers or Fire Department employees to "moonlight" violated any statute. Although plaintiffs have averred that such employees had an inherent conflict of interest, such is not a pleading of a fact but is a legal assertion, which is not entitled to any weight. If permission to "moonlight" could be legally or officially granted, then one cannot say that there was an inherent conflict of interest such that, as a matter of law, there was a duty to regard or suspect those employees as substantially likely to engage in acts of dishonesty.

More to the point, plaintiffs have not pled anything that even remotely suggests that Ms. Rodriguez's lack of training as a 911 dispatcher was the proximate cause of Mr. Beswick's death. To the contrary, plaintiffs have pled that her actions and those of other dispatcher violators were done knowingly in violation of an established regulation. This reflects that she knew how to handle emergency medical calls, and that she knew that, in Mr. Beswick's case, she had violated clear 911 requirements. This is evidenced by her second call to CareStat, wherein she asked Mr. Cieloszcyk at CareStat to help her cover up her mishandling of the 911 calls. (Compl. ¶ 105.) Lack of training, therefore, cannot reasonably be said to have been a proximate cause of Mr. Beswick's death or Ms. Rodriguez's dishonesty.

Plaintiffs allege that the City Fire Department has "completely failed to supervise the work of its 911 dispatchers and has completely failed to monitor tapes of dispatch calls." (Compl. ¶ 121F.) Such allegations are not adequate for pleading that there were known circumstances that created a duty of monitoring and supervision which was then breached by the City policymaker. Whether there is adequate supervision and monitoring could always be a matter of after the fact second-guessing. Indeed, a directive to dispatchers to refer all emergency medical calls to the Fire Department, only, was a simple directive, arguably would have left no room for exercise

of discretion as to where to refer such calls. Plaintiffs have not pled that a reasonable policymaker must have anticipated that the non-policymaking employee would, in the honest performance of the job, confront a situation that presented a choice, let alone a difficult one, as to where to refer 911 emergency medical calls. See Carter, 181 F.3d. at 357. In short, plaintiffs have not pled that Ms. Rodriguez made a mistake; they have pled that she acted dishonestly.

To make out a constitutional tort, there must be pled and proved that there existed an inescapable duty that was deliberately ignored or abandoned by the policymaker. Plaintiffs have failed to allege that there was any statutory or regulatory duty to monitor 911 calls for the purpose of determining if the 911 dispatchers were honest. Rather, plaintiffs have only alleged that if there had been some kind of monitoring system, employee dishonesty would have been detected and the culprits dismissed - among them, Ms. Rodriguez - before Mr. Beswick had need of a City emergency response team. At best, this amounts to a claim of negligence.

Plaintiffs have not pled that an honest Fire Commissioner had actual previous knowledge of any dispatcher conduct like Ms. Rodriguez's, such that a duty arose to monitor dispatchers with detection of possible dishonesty in mind. At most, plaintiffs have pled that the City policymaker failed to anticipate that

dispatchers might act dishonestly in the performance of their duties and failed to protect against that possibility. That is a negligence claim.

Plaintiffs have pled several instances of 911 dispatcher or Fire Department Rescue Unit errors or failure that might be characterized as callous but these are inapposite to Ms. Rodriguez's misconduct. Plaintiffs reference an "infamous Eddie Polec incident" from November 1994. A teenage boy died as a result of 911 calls made on his behalf being improperly handled. (Compl. ¶ 31.) There is no averment that the 911 dispatcher directed the Polec emergency call to a private ambulance company for response.

Plaintiffs have alleged that there was an instance where a City Fire Department Rescue Unit responded to a 911 call involving a 17-year-old who suffered painfully from disabilities related to sickle cell disease. (Compl. ¶¶ 38-43.) Although the mother believed her son was in "crisis," the City paramedics refused transportation and recommended that she allow them to place an order on her behalf with a private ambulance company. This is a situation where the 911 dispatcher acted appropriately and dispatched a Fire Department Rescue Unit. It is far too attenuated that a policymaker should have surmised from this event that dispatchers were acting dishonestly or were in need of training to avoid harm to the public. Moreover, plaintiffs have

not alleged that the Fire Department response team acted illegally or contrary to an established regulation, as contrasted possibly to their having a difference of opinion about whether the child's condition warranted an emergency response of the type desired by the mother. Nor is it pled that the transportation sought by the mother was to a hospital to which the paramedics were authorized to go. For example, the Rescue Unit may only have been authorized to transport a person to the nearest hospital, but the demand may have been for transportation to a different facility. Further, there is no claim that these Fire Department employees "moonlighted" for any private ambulance company or were ever shown to the knowledge of a City policymaker to have made the recommendation of private ambulance use, expecting a referral fee or any kind of personal benefit.

(3) Plaintiffs' claim that there existed an official policy of permitting dispatchers to "moonlight" for private ambulance companies and to refer 911 calls to them contrary to established regulation survives the motion to dismiss

Plaintiffs allege that the City policymaker exhibited deliberate indifference to the rights of persons requiring medical attention, including Mr. Beswick, by condoning the practice of 911 operators to direct 911 calls to private ambulance companies. This allegation satisfies the "proximate cause" element. If a policymaker knowingly puts into motion an illegal act that nullifies a regulation designed to help save

lives, necessarily, it is foreseeable that harm of the kind that was meant to be avoided by adherence to the regulation will be visited upon the public that was meant to be served.

Condonation connotes knowledge of, and participation in, directly or indirectly, the accused conduct. Although plaintiffs use the phrase "deliberate indifference," the complaint cannot be reasonably interpreted as other than alleging knowing participation either in Ms. Rodriguez's dishonest conduct or in identical misconduct by other dispatchers, all of which could be said to have caused Ms. Rodriguez's misdeeds.

Plaintiffs have averred that the City's policymaker, knowing that a substantial risk of employee dishonesty to the City was created by giving permission to dispatchers to "moonlight" for private ambulance companies, deliberately failed to design and employ oversight systems to guard against the potential danger to public safety of that dishonesty taking the form of sending emergency medical 911 calls to private ambulance companies. Plaintiffs have alleged that there was an inherent conflict in employees being permitted to moonlight. The court has rejected that averment as a "bald conclusion." However, to the extent that the complaint may be read as averring that the City policymaker had a duty to ascertain that an employee had no conflict of interest in working a second job and was deliberately indifferent to that duty, the complaint will be permitted to

proceed, since plaintiffs have also alleged the requisite that this deliberate indifference was for the purpose of condoning or promoting dispatchers' misconduct in referring 911 medical emergency calls to private ambulance companies.

2. Duty to rescue

The question of whether the City deprived plaintiffs of a constitutional right turns upon whether the City, through its action and inaction, created a duty to rescue.

Generally, the state has no affirmative obligation to protect its citizens from private harm. DeShaney v. Winnebago Co. Dept. of Soc. Services, 489 U.S. 189 (1989) (State's failure to protect an individual against private violence does not rise to constitutional violation). However, the third circuit has recognized two exceptions to this rule: the special relationship doctrine and the state-created danger doctrine.

a. Special Relationship Doctrine

Under the special relationship doctrine, a duty to rescue exists "when the state fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty." D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1369 (3d Cir. 1992) (en banc) cert. denied, 506 U.S. 1079 (1993). Under the special

relationship doctrine, a state assumes an affirmative duty to protect a person when it takes physical custody of a person or otherwise prevents that person from helping himself. Id. at 1370. In D.R., the third circuit found that no special relationship existed between a Pennsylvania public high school and its students who were being forced from their classrooms and sexually molested in school bathrooms by their classmates, because students are not in custody within the meaning of DeShaney when attending school. Rather, the students remained under the ultimate control of their parents as the primary care-givers. The students remained at liberty to help themselves or to have their parents assist them.

Here, the City correctly asserts that, since Mr. Beswick was not in the City's physical custody at the time that he was allegedly harmed, by the sixteen (16) minute, sixteen (16) second delay, the special relationship doctrine cannot apply.

b. State-Created Danger Doctrine

The state-created danger doctrine allows a plaintiff to recover under Section 1983 when, under certain circumstances, a state actor creates a danger that causes harm to an individual. See Morse, 132 F.3d at 907. This theory evolves from the Supreme Court's decision in DeShaney, where the Court rejected plaintiff's special relationship doctrine argument, holding that

the county department of social services was not liable under Section 1983 for failure to protect a young boy who was chronically abused by his father. Although the Court ultimately rejected plaintiff's claim, 489 U.S. at 195-96, it went on to explain that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 201. Based on this language that suggests that there could be liability if there is state-created danger, the third circuit, in Kneipp v. Tedder, 95 F.3d 1199 (1996), consistent with findings of the second, seventh, eighth, and tenth circuits, adopted a four-part test which holds a state actor could be found liable if: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. Kneipp, 95 F.3d at 1205, 1208 (citing Mark v. Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (establishing the four-prong test, but concluding that defendants in that case were not state actors)). However, as to municipal liability, the third circuit was careful to point out that only the standard of deliberate indifference applies; that is, there

must be pled and proven a "deliberate" or "conscious" choice by a municipality to adopt a policy or custom that actually caused the state actor to act with deliberate indifference to the safety of another. Id. at 1199, 1211.

i. Foreseeability

The City contends that plaintiff's complaint does not contain facts which establish that the harm to Mr. Beswick was foreseeable, or that Ms. Rodriguez had reason to know that Mr. Beswick's life was in danger.

In Kneipp, plaintiffs, parents of Samantha Kneipp, alleged that the police deprived Samantha of her right to substantive due process and her liberty interest in personal security when they separated a very intoxicated Samantha from her husband and left her to her own devices on a freezing cold night instead of taking her to the police station, hospital, or her own home. The district court granted summary judgment to defendants. The third circuit reversed, holding that the officers' alleged actions, if proven, amounted to deliberate indifference. The court found that the injuries to Samantha were foreseeable - the doctor's report stated that her blood alcohol level rendered her severely muscularly impaired, such that "a reasonable jury could find that the harm likely to befall Samantha if separated from [her husband] while in a highly intoxicated state in cold weather was

indeed foreseeable." Id. at 1208.

Given the claim of City policymaker condonation of unlawful conduct, the harm to Mr. Beswick was foreseeable, and fairly direct. It had to be foreseeable that a 911 call misdirected to a private ambulance company could result delays or inappropriate response that could, in turn, lead to serious harm or death.

ii. Willful disregard for plaintiff's safety

The City contends that the facts in the complaint do not establish that the City or Ms. Rodriguez acted in willful disregard for Mr. Beswick's safety because Ms. Rodriguez did not ignore the 911 call for assistance and in fact dispatched a private ambulance; further, upon the third call to 911 relating to Mr. Beswick, a City ambulance was dispatched.

In Miller v. City of Philadelphia, 174 F.3d 368, 375 (3d Cir. 1999) (citing County of Sacramento v. Lewis, 523 U.S. 833, 846-47 (1998)), the third circuit explained that "[t]o generate liability, executive action must be so ill-conceived or malicious that it 'shocks the conscience.'" "The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." Id. In other words, the more high pressure the situation, the more the City's actions must "shock the conscience" in order to establish a willful disregard for plaintiff's safety.

Plaintiffs' complaint alleges deliberate indifference in that City policymakers or authorized designees knew of a practice of dispatchers referring 911 calls to private ambulances, contrary to established regulations, and knew that violation of the regulations, adopted to promote and protect public safety, would foreseeably result in the kind of response delay and harm suffered by plaintiffs. The complaint also alleges that City policymakers knew that such dispatchers were violating known duties for personal enrichment and condoned such unlawful conduct or deliberately failed to employ oversight techniques in aid of that unlawful conduct.

Ms. Rodriguez has been sufficiently alleged to have known about the regulation requiring that all medical emergency calls go to the Fire Department for response. That violation of the rule created danger to Mr. Beswick that was not contemplated by the regulation. To prove a Section 1983 violation through Ms. Rodriguez's misconduct, plaintiffs must prove that Ms. Rodriguez's actions were proximately caused by the alleged City custom or practice of official condonation of dispatchers calling private ambulances to respond to medical emergency 911 calls. If Ms. Rodriguez's dishonest actions were motivated by independent criminal intent, then plaintiffs cannot recover.

iii. Relationship between City and Plaintiffs

The City does not dispute the existence of a relationship between Mr. Beswick and the City; however, it disputes the existence of any relationship between the City and Mrs. Wiegand. As plaintiffs make clear in their Response to the City's Motion to Dismiss, plaintiffs are not making a constitutional claim on behalf of Mrs. Wiegand. (Pl. Resp. to Def. Mot. to Dismiss, at 29.)

iv. State-actors used their authority to create a dangerous situation that otherwise would not have existed

The fourth prong of the state-created danger doctrine requires that plaintiff establish that state actors used their authority to create an opportunity that otherwise would not have existed for the harm to occur.

Ms. Rodriguez's actions of ensuring Mrs. Wiegand that help was on the way, and then improperly delaying the arrival of help by ignoring the second 911 call, arguably put Mr. Beswick in a worse position than if Mrs. Wiegand had never called 911 in the first place. Although Mrs. Wiegand was at all times free to seek other assistance, Ms. Rodriguez's assurance that "somebody was on the way" created in her the expectation that the City was undertaking to come to Mr. Beswick's rescue promptly. While Mrs. Wiegand was less than a mile away from a hospital, and possibly

could have sought alternative means to transport Mr. Beswick there, she decided to wait for a Fire Department Rescue Unit. The sixteen (16) minute, sixteen (16) second delay in the arrival of a competent ambulance was a danger to Mr. Beswick that was created through an alleged City policy or custom. Plaintiffs will have to prove that, but for this delay, Mr. Beswick would have survived altogether the condition which befell him, or would have lived longer than he did.

The City submits that the phrase "use of authority" in Kneipp addresses situations where state actors exercise authority over citizens and other individuals, and that the Beswick situation was not "use of authority." However, as this court sees it, the acts of taking a telephone call from a citizen requesting an ambulance, telling that caller that "somebody is on the way," and then, contrary to established regulation, arranging for a private ambulance company to respond, instead of the Fire Department, constitutes an "exercise of authority" over the 911 caller or beneficiary, for which the City may be liable under the state-created danger doctrine. The City cites two cases for its position. See White v. City of Philadelphia, 118 F. Supp.2d 564 (E.D. Pa. 2000); Huston v. Montgomery County, 1995 WL 766308 (E.D. Pa. 1995). These are inapposite.

In White, family members of murder victim brought a Section 1983 action against the City of Philadelphia and City police

officers to recover for constitutional deprivations arising from officers' failure to rescue victim after responding to an emergency call. Officers had responded to a 911 call placed by her neighbors who had heard screaming from her apartment; upon their arrival, the officers knocked at the door, heard nothing, and left. It was alleged that at the time the victim was alive, but was killed shortly after the officers left. 118 F. Supp. at 567. Plaintiffs alleged that, as a result of the City's failure to train its officers to make forcible entries in such life-threatening situations, the City deprived Ms. White of her life and liberty without due process. Id. Applying the state-created danger test, the court granted the City's motion to dismiss, finding that (a) Ms. White's injuries were not foreseeable because 911 calls in the category of "domestic disturbance," as this one was categorized, usually did not result in murder; (b) officers' behavior did not rise to the level of "conscious-shocking" for the situation; (c) there was no relationship between the City and Ms. White because she was not a foreseeable victim; and (d) the officers' inaction of failing to protect Ms. White from private violence did not create liability because it did nothing to place her further in jeopardy. Id. at 569-72.[2]

[2]Since the officers did not have a duty to rescue plaintiff, the court found that, even if the City acted with deliberate indifference, it was not liable under Section 1983, since Ms. White's constitutional rights were not violated. Id. at 576. The deliberate indifference there could not, as here, be fairly

The facts of this case, while revolving around a 911 call, are inapposite to those of White. Deliberate violation of the Fire Department 911 response regulation by City policymakers, and through Ms. Rodriguez, created a danger that could not be said to be the natural progression of Mr. Beswick's physical condition.

In Huston, plaintiff-decedent Patrick Huston was experiencing severe chest pains and could not breathe. His fiancee called 911, giving directions to Huston's house. However, the dispatcher sent a City ambulance to the wrong address. Huston himself then called 911 but was unable to give his address because he was no longer able to speak clearly. Because of an antiquated 911 computer system, the dispatcher was able to get from him the address but not the apartment number. As a result of a 20-minute delay that ensued, Huston was in full respiratory arrest when the ambulance arrived. He died shortly thereafter. The court found that the municipality's alleged actions did not amount to a state-created danger because the complaint did not allege that any state actors "actively prevented Patrick Huston or his fiancee from seeking help from other sources, much less that any state actors used physical force or threat of arrest to prevent others from providing help to Patrick Huston." Id. at *6 (citing Jackson v. Byrne, 738 F.2d 1443, 1447-48 (7th Cir. 1984)). Further, the court noted that

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characterized as allegations of illegal or criminal acts.

the state did not create the medical condition from which Huston suffered. "His and his fiancee's failure to seek help from other sources because of the representations made by various state actors did not expose him to or exacerbate the harm he was already facing but only inhibited his ability to receive help with regard to that harm." Id. at *5.

Huston involved a municipality's antiquated 911 system, and a combination of human and computer error which caused the delay that allegedly contributed to a death. Here, plaintiffs allege that City policy effectively prevented an otherwise fully functional 911 emergency system from working properly; the City policymaker, through Ms. Rodriguez, prevented Mr. Beswick from being timely rescued. See Ross v. United States, 910 F.2d 1422 (7th Cir. 1990) (reversing district court's grant of summary judgment to defendant County).

In Ross, the seventh circuit found that a county violated plaintiff's constitutional rights when it enforced its policy requiring only county personnel to provide police services within the lake in which twelve-year old William Ross was drowning. A County Deputy Sheriff physically prevented private individuals from rescuing him, and, by the time county rescue officials arrived, William had been under water too long to be saved; he died the following morning. Finding that the county's conduct rose to the level of a constitutional violation by preventing

William from receiving private emergency assistance, the court noted:

> This is not a case like [DeShaney] or [Archie]. In those cases, the government's failure to provide services that would have saved a person from injury was held not to be a constitutionally cognizable claim. The plaintiff complains of a much different type of constitutional wrong. The plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, the wrong suffered by the plaintiff and her decedent is the county's forced imposition of services that William did not want or need; the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative. . . . The plaintiff alleges that Lake County had a policy of cutting off private aid to drowning victims, even where the county's replacement protection would not effect a rescue. Because the county's policy led to the deprivation of William's constitutionally protected right to life, the plaintiff's claim is cognizable under section 1983.

Id. at 1431 (citations omitted).

Here, it has been sufficiently pled that a City policy of deliberate indifference to violation of a Fire Department regulation, which was designed to try to save lives, prevented Mr. Beswick from receiving promised public aid from Fire Department paramedics, just as in Ross county policy prevented a drowning boy from receiving willing private aid.

B. Actions solely directed against defendants other than the City

The City notes that, while it is not named as a defendant in Counts II, III, IV, and VII of the complaint, the demand clauses in these counts seek damages against "all defendants." Since the

City cannot be held jointly liable with private defendants for non-constitutional causes of action, those Counts, as pertain to the City, are dismissed.

III. Conclusion

For the foregoing reasons, the City's Motion to Dismiss the Second Amended Complaint is granted, in part, and denied, in part.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RALPH RAYMOND BESWICK, et al.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al.	:	NO. 00-1304

ORDER

Giles, C.J.

AND NOW, this ___ day of March 2001, upon consideration of Defendant City of Philadelphia's Motion to Dismiss Plaintiffs' Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6), and the arguments of the parties, for the reasons outlined in the attached memorandum, it is hereby ORDERED that the City's motion is DENIED as to Count I, except that the motion is GRANTED as to the theories of lack of training; lack of monitoring; failure to terminate Ms. Rodriguez; and failure to license and inspect private ambulances; and is GRANTED as to any claim that was asserted personally by Rose Wiegand against the City.

The City's Motion to Dismiss is GRANTED as to Counts III, IV, V, and VI.

BY THE COURT:

_____

JAMES T. GILES C.J.

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